In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1390

PHILIP BENTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a trial by jury in the United States District Court for the Eastern District of New York, petitioner, an employee of the United States, was convicted of conspiracy to commit bribery in his official capacity, in violation of 18 U.S.C. 371, 201(c).[1] He was sentenced to imprisonment for eighteen months. The court of appeals affirmed (Pet. App. 1a-9a).

In 1967, the firm of S. Tepfer and Sons, a Long Island arms and munitions manufacturer, had lost several contracts with the Edgewood Arsenal, Mary-

[1] At the close of all the evidence, the court dismissed the eleven substantive counts on the ground of improper venue (Tr. 1102-1107).

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land. Co-conspirator Chervin, the company's contracts manager, related his problem to co-conspirator Migdal, a postal employee who worked part time for a company with which the Tepfer Company had business dealings. Migdal suggested that Chervin get in touch with petitioner, a contract specialist at the Edgewood Arsenal (Tr. 6, 123–124).

At Chervin's request, Migdal discussed with petitioner whether he would be interested in helping out the Tepfer company for a fee. At first petitioner was non-committal, but, after meeting with Chervin and Migdal, petitioner agreed to help the Tepfer company on its negotiated contracts for part of a commission of 5%, which the conspirators agreed was to be divided equally among petitioner, Migdal and Chervin (Tr. 15–16, 501–505). Chervin obtained the approval of Leo Tepfer to the 5% commission, but did not reveal that he and Migdal were sharing in it (Tr. 306, 355–357, 445).

The 5% commission was later renegotiated and replaced by $100,000 for petitioner (Tr. 75–77, 83). Various payments to petitioner were made—$2,500 by Migdal (Tr. 28–30, 516–518), $22,000 by Chervin (Tr. 144), and some half dozen payments by Leo Tepfer (Tr. 303, 312–313, 315). Cancelled checks and registration records at the Hilltop Inn, where a number of the payments to petitioner were made, corroborated the oral testimony of Chervin, Migdal, Tepfer and Tepfer's son. During the period when the payments were being made, petitioner made large purchases of luxury items (Tr. 839–842, 860–864).

Petitioner explained the purchase in cash of a third family car by saying that he bought it for his son with his son's money (Tr. 772–773). The son testified that the car was purchased for him, but not with his money, and that he had later repaid his father (Tr. 1093–1094).

1. Petitioner's counsel, in closing argument to the jury,[2] explained the testimony of the four co-conspirators as a "frame" to cover their own criminal conduct. In the language of counsel, these witnesses were "stealing" (Tr. 1126, 1129, 1130); were "liars" (Tr. 1120), "evil men" (Tr. 1133), and "crooks" (Tr. 1119, 1121, 1126, 1131, 1134, 1135, 1137, 1138, 1143, 1157, 1160, 1161, 1162, 1163, 1164). On the other hand, counsel had only the highest praise for petitioner as a devoted family man of honesty and integrity, who had served his country well, saving it millions of dollars by his work at the Edgewood Arsenal (Tr. 1143–1144, 1158–1159). He closed with the argument that (Tr. 1164):

> The government's case is based on the story of these four miserable crooks. You have heard the defense. You heard all these clean people on the defense side. You heard Phil Benter, who has an absolutely unblemished record. Not only that he has never been convicted, but outside of this case he has never been charged with a crime.

In response, government's counsel repeatedly referred to petitioner as "Honest Phil," and stated that

[2] In the Eastern District of New York the defense makes the first closing argument, followed by the prosecution (Pet. 3a).

if the jury thought that the prosecution's case was a "frame," they should acquit him. The court of appeals was of the opinion that the references to a "frame" were undignified and in the ordinary case, improper. It held, however, that they had been invited by the defense argument (Pet. 5a–6a).

As to the references to petitioner as "Honest Phil," the court below strongly condemned the prosecutor "for the flinging of first-name epithets at a defendant that might be commonplace in a second-rate movie or television script." It believed that these references were "beneath the dignity of the United States Attorney's office and of the United States as a sovereign" (Pet. 6a–7a). The court concluded, however, that "in the circumstances of this case it did not constitute reversible error because there was ample evidence to justify conviction and Benter had indeed lied in reference to the payment for his third car" (Pet. 8a).

This ruling was proper in the circumstances of this case. We, of course, agree that the United States Attorney should have resisted the temptation of being drawn into such arguments. *United States* v. *Medina*, 455 F. 2d 209 (C.A. 1). The evidence showed, however, that petitioner, a trusted employee of the government in a sensitive position, had illegally obtained a substantial amount of money from betrayal of that trust. There was little to support the defense claim that his former confederates, who had paid the bribe, had concocted the tale that petitioner had received a bribe. Accordingly, while the "Honest Phil" reference was unfortunate, in light of defense counsel's argument

(see Pet. App. 3a–6a) and the evidence there is no reason to overrule the court of appeals on its disposition of the case.[3]

2. Petitioner urges that he could not be convicted for conspiracy to violate 18 U.S.C. 201(c), because concert of action is always necessary in a bribery offense, citing *United States* v. *Sager*, 49 F. 2d 725, 727–728 (C.A. 2). The court of appeals correctly dealt with this claim by pointing out that there were more participants than were necessary to the commission of the substantive offense. The conspiracy in this case did not simply involve the payer and receiver of a bribe. On the contrary, co-conspirator Migdal was initially an intermediary who was compensated for his efforts by receiving a portion of the bribe money. See *United States* v. *Smolin*, 182 F. 2d 782, 786 (C.A. 2). In addition, as Mr. Justice Holmes observed in *United States* v. *Holte*, 236 U.S. 140, 145:

> But a conspiracy with an official or employee of the government or any other for an offense that only he could commit has been held for many years to fall within the conspiracy section * * *.

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[3] Petitioner's counsel complied fully with the court's request that counsel not interrupt the summations "unless there is the clearest of provocation for it" (Tr. 1116). Petitioner's contention that he was thus handicapped from objecting to the government argument is untenable. It is more likely that he refrained from objecting because his own presentation would have placed him in a position of ridicule before the jury since he had earlier referred fifteen times to those who had testified for the government as "crooks."

See also *May* v. *United States*, 175 F. 2d 994, 1003-1004 (C.A.D.C.), certiorari denied, 338 U.S. 830. Moreover, no problem of double punishment is involved in this case—the difficulty sought to be obviated by the *Sager* ruling—since the substantive counts were dismissed after jeopardy had attached.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1972.

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